

MICHAEL BLAKE ET AL.

IBLA 93-657

Decided February 10, 1997

Appeal from a decision of the Associate District Manager, Carson City, Nevada, District Office, Bureau of Land Management, finding no significant impact and implementing the New Pass Herd Management Area Plan and Capture Plan. NV-03480; NV N3-93-02.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A BLM decision implementing a wild horse area management plan and capture plan based on an appropriate management level which will avert deterioration of the range and preserve a thriving natural ecological balance in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1994), will be upheld where the record demonstrates that the decision is based upon a reasonable analysis of data collected on an ongoing basis.

APPEARANCES: Gary L. Francione, Esq., and Anna E. Charlton, Esq., Rutgers Law School, Newark, New Jersey, for appellants; Karl Kipping, Associate District Manager, Carson City District Office, Carson City, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Michael Blake, Timothy Wilson, and the Public Lands Resource Council have appealed from the July 19, 1993, decision of the Associate District Manager, Carson City, Nevada, District Office, Bureau of Land Management (BLM), implementing the New Pass Herd Management Area Plan and Capture Plan (HMA/Capture Plan) and approving a finding of no significant impact (FONSI) based on Environmental Assessment (EA) No. NV-030-93-013 and section 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1994).

The entire New Pass Herd Management Area (HMA) encompasses 225,000 acres in BLM's Carson City and Battle Mountain Districts. The HMA/Capture Plan applies to approximately 24,669 acres of the public and private land included in the HMA, which lie within the Carson City District in the Clan Alpine and New Pass grazing allotments. Approximately 90 percent of the HMA is situated within the Clan Alpine allotment (HMA/Capture Plan at 3).

The Lahontan Proposed Resource Management Plan (RMP) and final environmental impact statement published on November 8, 1984, <sup>1/</sup> set out general guidance for management of the New Pass HMA and was the product of a planning process that commenced in July 1981. The RMP, which stated that plans would be developed to provide further direction for the management of wild horses in HMA's, established initial population levels of 175 horses for the Clan Alpine allotment and 11 horses for the New Pass allotment portions of the HMA. According to the RMP, adjustments to both wild horse and livestock population levels would be based on analysis of data from monitoring studies, coordination of wildlife and livestock plans, and consultation with interested parties (RMP at 2-15; HMA/Capture Plan at 3-4). The RMP also limited vegetation utilization levels to 55 percent to improve the condition and productivity of public rangelands and enhance livestock grazing (HMA/Capture Plan at 3-4).

In an allotment evaluation review dated September 27, 1989 (Allotment Evaluation), BLM reviewed the monitoring data collected during the 1984-88 grazing years, including supporting data from the 6 years preceding the evaluation period, to determine whether multiple use objectives for the Clan Alpine allotment were being attained, and if not, what changes in current management would be required to achieve the specific objectives for the allotment articulated in the RMP (Allotment Evaluation at 1, 6). The record also contains a May 26, 1992, document titled "NEW PASS HMA AREA EVALUATION FOR THE CLAN ALPINE ALLOTMENT PORTION" (New Pass Evaluation) in which the status of progress in achieving four wild horse goals for the HMA

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<sup>1/</sup> There is some confusion in the references to the final Lahontan RMP. On page 3, the HMA/Capture Plan cites the "Lahontan Resource Management Plan (RMP; Nov. 8, 1984)." In response to this Board's order in this matter dated Oct. 8, 1993, however, by letter dated Oct. 20, 1993, BLM submitted copies of "the 1985 Lahontan Resource Management Plan and accompanying Environmental Impact Statement and Record of Decision and the 1985 Rangeland Program Summary and its 1989 update." What BLM styled the 1985 Lahontan RMP in the Oct. 20 letter actually is titled "Lahontan Resource Management Plan & Environmental Impact Statement," the undated first page of which bears the title "Draft Resource Management Plan and Environmental Impact Statement for the Lahontan Resource Area." That same page refers to the document as the "proposed resource management plan" and contains a further explanation that it is "both the draft environmental impact statement for the resource management plan and the draft for a separate legislative final impact statement for wilderness." Other references in the record suggest the Lahontan RMP, record of decision and environmental impact statement (EIS) were completed as final on Sept. 3, 1985. See, e.g., the Proposed Multiple Use Decision (MUD) dated June 15, 1992, at 1. It appears that in all instances material to the issues on appeal, the text of both documents is identical or virtually identical. Therefore, for simplicity and convenience, in referring to the RMP we have made no further attempt to distinguish between the draft and final versions.

was discussed. Based on actual use and utilization data, BLM determined that during the 1984-88 period vegetation utilization levels did not exceed 55 percent, but that an increase in horse or livestock numbers likely would result in overutilization (New Pass Evaluation at 1). Noting that the most recent census conducted in November 1989 documented 90 horses in the Clan Alpine allotment portion of the HMA, the evaluation ended with the recommendation that wild horse numbers be limited to a maximum of 90 head, and that to reduce the stresses associated with captures, BLM should conduct periodic gathers to reduce horse numbers to 69 and then allow the numbers to increase back to 90 horses over a projected 3-year period between gathers (New Pass Evaluation at 1-2).

On June 15, 1992, BLM issued the MUD for the Clan Alpine allotment, which was based on the data and analyses set forth in the EIS for the Lahontan RMP, an October 1985 Rangeland Program Summary (RPS) and its December 1989 update. The wild horse management decision portion of the MUD relative to the New Pass HMA of the Clan Alpine allotment <sup>2/</sup> concluded that monitoring and the allotment evaluation process had established that a thriving natural ecological balance could be obtained through an appropriate management level (AML) of 69 to 90 wild horses for the New Pass HMA (MUD at 7). BLM more specifically explained its rationale:

Monitoring information indicates that approximately 1,080 AUMs [animal unit months] are being used by wild horses in that portion of the Clan Alpine Allotment which occurs in the New Pass HMA in combination with current livestock numbers. Actual counts and utilization records show that approximately 1,080 AUMs or 90 wild horses are the maximum stocking level within the Clan Alpine Allotment portion of the New Pass HMA (90% of the HMA is within the Clan Alpine Allotment). This AML was based on actual numbers of wild horses and livestock during the evaluation period.

By maintaining the wild horses and livestock AUMs at this level it is anticipated that Land Use Plan objectives will be met including maintaining or improving current ecological condition and maintaining utilization at 55 percent or less on key species on upland areas.

In order to prevent resource damage, horse numbers will be limited to a maximum of 90 animals. To avoid annual removals and

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<sup>2/</sup> In Michael Blake, 135 IBLA 9 (1996), these same appellants raised virtually the same arguments here presented, but with respect to the Desatoya Herd Management Area Plan and Capture Plan (Desatoya Plan). The Desatoya HMA also is within the Carson City District, and the Clan Alpine allotment is partially within the Desatoya HMA. The Desatoya Plan EA also was tiered to the Lahontan RMP and EIS.

to minimize stresses and band disturbances associated with removals, removals will be conducted every three years. To avoid excessive vegetation utilization horses will be managed within a range of 69 to 90 animals. This will allow for a 9 percent rate of increase to a maximum of 90 head. In accordance with 43 CFR 4720.1, all wild horses in excess of the appropriate management level of 90 will be removed.

Id. at 8-9.

The EA was tiered to the EIS for the Lahontan RMP, which analyzed the general impacts of managing the rangelands in a program that included monitoring and adjustment of wild horses and livestock as appropriate. The preferred proposed management action as stated in the EA "is to achieve a thriving ecological balance between the vegetative community, wild horses, wildlife and livestock and maintain the wild horse population in a healthy state" (EA at 14 of the HMA/Capture Plan). <sup>3/</sup> A no-action alternative was considered and rejected. Id. at 18. In addition, herding the horses on horseback was considered and rejected without analysis as not feasible in the New Pass HMA. Id. at 15. After citing the objectives and constraints embodied in the RMP, the 1989 Lahontan RPS Update, and the MUD relative to the management of the HMA, and noting that the September 1992 census indicated a total of 40 wild horses within the HMA, specific animal and habitat goals and management methods designed to achieve those ends were enumerated (HMA/Capture Plan at 3-6). The animal objectives consist of maintaining the wild horses in good or excellent physical condition; perpetuating the free-roaming nature of the wild horses; keeping the wild horses within the HMA; minimizing the adverse effects of gathers to both the individual wild horses and the population; removing only adoptable wild horses; and preserving genetic diversity. The habitat objectives consist of improving the habitat within the HMA; identifying key habitat areas within the HMA; and allowing no more than 55-percent utilization on key plant species and 40 percent on interim grass species. Id. at 10-11.

The management actions devised to accomplish these aims include managing the horses within the range of 69 to 90 animals as established in the MUD; increasing the interval between gathers from 3 to 4 years by reducing the population of wild horses within the HMA to below the maximum number of horses that the habitat can support; using contraceptives to slow the rate of population increase; removing only animals under 10 years of age; minimizing stress on foals and nursing mares during captures; removing horses outside the HMA and placing them into the adoption program or releasing them into other HMA's; and adjusting the wild horse population to a level in balance with the forage productivity of the habitat within the HMA.

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<sup>3/</sup> The EA was incorporated into and made a part of the HMA/Capture Plan and begins on page 14.

to ensure an adequate amount of forage. Id. at 8-10. In addition, the HMA/Capture Plan provides that

[p]rior to future removals current utilization data will be analyzed to determine if the AML's set in the multiple use decisions are still appropriate. Further gathers may be postponed if current data indicates that the HMA can support an increased horse population. Also, future gathers may decrease the horse population below the minimum AML if current monitoring data indicates that the AML is too high for current conditions.

Id. at 8.

The document outlines additional studies designed to monitor the attainment of the specific management objectives developed for the New Pass HMA, including animal studies focusing on actual use, demography, habitat and soil studies documenting utilization, trend, and ecological status (HMA/Capture Plan at 11-12). The entire Plan will be evaluated in 1997 to determine whether objectives are being met, and all subsequent adjustments will be based on rangeland monitoring information. Id. at 12-13.

Appellants submitted comments on the May 1993 draft HMA/Capture Plan, EA, and FONSI circulated by BLM for public comment. In general, appellants challenged BLM's statutory authority to conduct a round-up of wild horses and asserted that no evidence that the 40 horses within the HMA threatened the area's thriving ecological balance had been presented. Appellants also suggested that any stray horses outside the HMA could be placed inside the boundaries of the HMA, thus obviating the necessity for removal and adoption. Appellants further contended that no removals should occur until an EIS had been prepared.

By letter dated July 19, 1993, BLM responded to appellants' comments. BLM indicated that the Plan would be in effect until vegetative monitoring data established that the numbers set out in the Plan were no longer valid, and advised that when the population reached the limit set in the HMA/Capture Plan, it intended to conduct a removal as prescribed therein. BLM also explained that horses removed from outside the HMA could not be relocated a short distance from the capture area because they simply return to that area, and assured appellants that helicopters would not be used during March through June to minimize hazards to foals and mares.

On that same date, BLM issued its decision to implement the HMA/ Capture Plan, and based on the analysis in the EA, found no significant impacts would occur. BLM concluded that implementation of the Plan conformed to the RMP and would maintain the range in a thriving natural ecological balance and prevent a deterioration of the range in accordance with section 3(b) of the Wild Free-Roaming Horses and Burros Act,

as amended, 16 U.S.C. § 1333(b) (1994), thus reducing soil erosion and improving the physical condition of the wild horses. <sup>4/</sup>

On appeal, appellants contend that BLM has failed to establish that there is an overutilization of forage resources in the HMA justifying a removal of any horses from the area, averring that the HMA/Capture Plan itself "concedes that BLM does not presently have the data with which to evaluate range conditions and allocate forage for livestock, wildlife, and wild horses to achieve a thriving natural ecological balance among all multiple users" (Statement of Reasons (SOR) at 5). They assert that the HMA/Capture Plan's failure to demonstrate that overuse of key species of vegetation is occurring, that overutilization is attributable to wild horses, or that the planned removal will improve ecological conditions within the HMA undermines its validity and that since BLM does not intend to circulate a new wild horse capture plan before implementing a capture decision, they will be deprived of the opportunity to learn the basis for the capture decision. Id.

Appellants argue that BLM cannot base a determination that excess wild horses exist on monitoring data not yet presented or analyzed and that the Plan and EA are therefore invalid. Id. at 6. BLM should not be permitted to remove horses from the HMA, appellants maintain, before drafting and distributing for public comment a plan that establishes overuse of key vegetative species attributable to wild horse grazing and deterioration in the natural thriving ecological balance caused solely by an excess of wild horses, to demonstrate that the planned removal will improve ecological conditions in the HMA. Id. Appellants further argue that BLM should not be permitted to remove horses until it establishes that its AML is based on range monitoring data, which is required by statute. Lastly, appellants contend that BLM also should be compelled to fully assess the environmental consequences of the removal action and thoroughly consider alternative measures under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(c) (1994). Id. at 6-7.

BLM disputes appellants' contention that it does not currently have adequate or necessary data with which to evaluate range conditions, quoting the HMA/Capture Plan's discussion of the MUD, which divided the available forage among wildlife, wild horses, and livestock and established the AML for the Clan Alpine allotment portion of the New Pass HMA based on vegetation monitoring. BLM states that although the appropriate levels of wild horses, wildlife, and livestock were established through monitoring, an extended drought has caused many horses to move to the Battle Mountain

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<sup>4/</sup> On Aug. 3, 1993, BLM reissued the decision and FONSI for the HMA/ Capture Plan to correct the inadvertent omission of appeal information and to delete the word "Draft" on the July 19, 1993, FONSI and decision. The reissued decision expands on the rationale for the FONSI determination, but does not alter the underlying basis for the decision to implement.

District and that as a consequence, BLM does not anticipate any need for immediate wild horse reductions. BLM reiterates that a removal of wild horses is not justified at this time since only 40 wild horses currently occupy the Carson City District portion of the New Pass HMA. BLM affirms that it does not intend to remove wild horses until the population exceeds 90 animals, and then only if current monitoring data verifies that the AML set in the MUD remains valid, adding that the purpose of the HMA/Capture Plan is to guide the management of wild horses within the Carson City District portion of the New Pass HMA until conditions change substantially (BLM Response at 1). 5/

BLM agrees that overuse is not now taking place and asserts that managing wild horses and livestock within the range established in the MUD will prevent overuse from occurring. Should the numbers identified in the MUD become obsolete, BLM indicates that prior to a wild horse removal, it will prepare a new evaluation with the opportunity for public input and will issue a proposed MUD with an additional opportunity for public comment and/or protest prior to finalizing the MUD. Id. at 1-2.

BLM denies that it has failed to present or analyze the monitoring data underpinning the HMA/Capture Plan, and notes that a 1990 allotment evaluation and the proposed 1992 MUD were mailed to the parties who had requested notification of wild horse, grazing, and wilderness management activities within the Carson City District. BLM further notes that the proposed MUD became final when no protests were filed. Id. at 2. 6/

[1] Section 3(b)(2) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b)(2) (1994), provides the statutory authority for the removal of excess wild free-roaming horses and burros from the public range. Specifically, the statute provides that where the Secretary of the Interior determines on the basis of available information

that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken \* \* \* until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1994). "[E]xcess animals" is defined in the Act as wild free-roaming horses or burros "which must be removed from an area

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5/ BLM's response addressed the points raised in appellants' notice of appeal, which also included requests for a stay and for an expedited hearing. The Board denied these requests by order dated Sept. 2, 1994. The arguments raised in the notice of appeal were repeated in appellants' SOR.

6/ Appellants were not among the parties identified in the distribution list of those who received notice of these actions.

in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1994).

The goal of wild horse and burro management is to maintain a thriving natural ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros. 16 U.S.C. § 1333(a) (1994); Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984); Michael Blake, 135 IBLA at 14; American Horse Protection, Inc., 134 IBLA 24, 26 (1995); Animal Protection Institute of America, 131 IBLA 175, 178 (1994). A determination that removal of wild horses is warranted must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend in range condition, actual use, and climatic factors. Animal Protection Institute of America, *supra*; Animal Protection Institute of America, 117 IBLA 4, 5 (1990). Where the record establishes that an area is either currently experiencing resource damage or there is a significant threat of resource damage, removal is warranted. Portland Audubon Society, 128 IBLA 370, 374-75 (1994); Animal Protection Institute of America, 109 IBLA 112, 114 (1989). BLM may remove horses to prevent their numbers from becoming excessive. American Horse Protection, Inc., *supra*; Animal Protection Institute of America, 118 IBLA 63, 75 (1991). BLM need not wait until actual damage to the rangeland occurs, but may take preventative action to avoid it. Michael Blake, 135 IBLA at 15; American Horse Protection, Inc., *supra*; Animal Protection Institute of America, 118 IBLA at 75.

Appellants' challenge to the adequacy of the HMA/Capture Plan essentially rests on the validity of the AML established for the Clan Alpine allotment portion of the New Pass HMA within the Carson City District and the concomitant determination to remove horses above that AML as excess animals. The Board will affirm a decision establishing the AML suitable for an HMA where the decision is predicated on an analysis of monitoring data such as grazing utilization, trend in range condition, actual use, and other factors that demonstrate that maintenance of the herd at the prescribed levels of horse population will restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with section 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1994). American Horse Protection, Inc., 134 IBLA at 26-27. As we said in Michael Blake, *supra*, an appellant bears the burden of demonstrating by a preponderance of the evidence error in ascertaining, collecting, or interpreting the data and facts upon which BLM relies.

Although appellants claim that BLM lacks the data necessary to determine the optimum number of horses in the HMA, the record contains abundant evidence of studies and observational data documenting utilization levels and patterns, trends in ecological and range condition, actual use, and demography and vegetative monitoring supporting the establishment of the AML for the HMA, including the 1989 Allotment Evaluation, the 1992 New Pass



HMA Evaluation for the Clan Alpine allotment, and the MUD. These were entirely consistent with the data and analyses set forth in the Lahontan RMP, EIS and RPS. The data clearly validate BLM's conclusion that limiting horses to a maximum of 90 animals will preserve a thriving natural ecological balance among wild horses, wildlife, livestock, and vegetation and prevent range deterioration.

Appellants' arguments fail to recognize that the additional monitoring and studies identified in the HMA/Capture Plan are necessary to assure that the land-use planning and management objectives are achieved. That such monitoring will continue does not discredit the reliability of the data previously collected upon which the Plan was based, and we reject appellants' assertions to the contrary. Appellants have offered no specific evidence or contrary data showing or suggesting error in the basis and method of establishing the AML, and accordingly, the decision to implement the HMA/Capture Plan is affirmed.

Similarly, the HMA/Capture Plan's conclusion that if the wild horse population exceeds 90 animals, the excess horses will be removed unless ongoing monitoring indicates otherwise must be affirmed. A decision to gather wild horses from an HMA area to avert deterioration of the range and preserve a thriving natural ecological balance will be affirmed where the record demonstrates that the decision is based upon a reasonable analysis of data collected on an ongoing basis. Audubon Society of Portland, 128 IBLA at 375. Appellants have not shown by a preponderance of evidence that BLM's HMA/Capture Plan is based upon erroneous facts, methods, conclusions or management objectives.

Appellants also worry that BLM may conduct a removal in the future without providing the public an opportunity to learn the grounds for the capture. As noted above, BLM has explained that captures authorized by the HMA/Capture Plan will occur only if the wild horse population exceeds 90 animals and current monitoring data sustain the continuing validity of that AML. If the information suggests that the AML is no longer appropriate, BLM will reevaluate the HMA/Capture Plan and circulate appropriate draft decisions for public comment and protest. Under these circumstances, we find appellants' concerns are without merit.

With respect to appellants' arguments regarding the adequacy of the EA, they have neither alleged nor shown any specific deficiency in the EA. Moreover, as discussed above, the EA was tiered to the EIS for the Lahontan RMP, which analyzed the general impacts of the management actions here at issue. BLM states that the HMA/Capture Plan is a "project specific refinement of the RMP/EIS focused on the management of wild horses in the New Pass HMA" (EA at 14 of HMA/Capture Plan). Appellants have not demonstrated any error or deficiency in the process by which the EIS and Lahontan RMP were developed, and none in the EA and supporting analyses derived from that effort, and as we discern no flaw, we reject appellants' objections. For the same reasons, the argument that BLM has not complied with NEPA fully is also rejected.

To the extent not specifically addressed herein, appellants' arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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T. Britt Price  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge

